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In The

Supreme Court of the United States

October Term, 1975

No. 75-1035

BOARD OF JUNIOR COLLEGE DISTRICT NO. 515, COUNTIES OF COOK AND WILL AND STATE OF ILLINOIS, a body politic and corporate, and JAMES GRIFFITH, ANTHONY HANNAGAN, DORIS HILL, WILLIAM JACKSON, LESTER KLOSS, SHIRLEY MELLECKER and THOMAS PORTER, individually and as members of the Board of Trustees,

Petitioners,

vs.

RICHARD W. HOSTROP,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WAYNE B. GIAMPIETRO
134 N. LaSalle Street
Chicago, Illinois 60602

JAMES PAPPAS
1492 Aberdeen Street
Chicago Heights, Illinois 60411

Attorneys for Respondent

Midwest Law Printing Co., Chicago 60601, FInancial 6-3988

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To the Justices of the Supreme Court of the United States:

The Respondent, Richard W. Hostrop, respectfully prays that the Petition for Writ of Certiorari filed herein be denied.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported officially at 523 F.2d 569 (1975), and is reproduced as Appendix "A" to Petitioners' Petition. The opinion of the District Court is reported officially at 399 F. Supp. 609 (1974).

QUESTIONS PRESENTED

Petitioners have briefed two questions in their Petition for Writ of Certiorari:

1. Whether the members of a Community College Board of Trustees may act as witnesses, investigators, judge and jury?

2. Whether a public body is immune from liability for discharging an employee without due process?

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to the Constitutional Provisions and Statutes set forth in Petitioners' Petition, the following are pertinent.

The Illinois Constitution of 1970, Article VIII, §4 states:

> "Except as the General Assembly may provide by law, sovereign immunity in this State is abolished."

Chapter 122 Ill. Rev. Stats., §103-11 states:

> "The board of each community college district is a body politic and corporate by the name of 'Board of Trustees of Community College District No. ....., County (or Counties) of ..... and State of Illinois' and by that name may sue and be sued in all courts and places where judicial proceedings are had. The State Board shall issue a number to each community college district, which number shall be incorporated in the name of the board of that district."

STATEMENT OF THE CASE

Plaintiff commenced his employment as the President of Prairie State College in 1967. He was employed under a series of written employment agreements. On April 2, 1970, the Board of Trustees of the College unanimously voted to extend his then-existing contract, as a result of which he was entitled to employment as President of the College through June 30, 1972.

On June 20, 1970, an informal gathering of the members of the Board and Plaintiff was held at the home of the Board Chairman, Lester Kloss. At this meeting, denominated a "workshop," various of the Board members voiced certain concerns about the way in which Prairie State College was being administered. No minutes were taken at this

gathering. As the workshop wore on into the late hours, Plaintiff was given no opportunity to respond to the various matters mentioned by the Board members. Significantly, nothing was said at this meeting which indicated that there was any intention or desire on the part of anyone to terminate Plaintiff's employment.

Plaintiff did evidence a desire to respond to the various matters which had been brought up by the Board members, and a date was set for the continuation of the discussion. This meeting, although re-set from time to time, was never held. The Board members themselves, however, met on several occasions subsequent to that meeting, but Plaintiff was never invited to attend any of those gatherings. Also, several regularly scheduled Board meetings were held, but the matters which had been discussed on June 20, were not placed on the agenda or discussed at any of these meetings.

During the period between June 20, 1970, and July 23, 1970, the Board Members decided that Plaintiff must either resign or be terminated, although they never informed Plaintiff that such action was being contemplated. The first that Plaintiff was aware that the Board intended to terminate his employment was on July 13, 1970, at 4:30 p.m., when he was suddenly called to meet with the Chairman of the Board and a special attorney who had been hired on that very same date. When he arrived, Plaintiff was informed that he had two choices: either resign or be terminated. He was also told that the Board desired that his employment problem be determined by July 24, 1970. Plaintiff, at this meeting, requested that he be given written charges and a notice of the reasons for the Board's action. This request was denied.

At no time prior to Plaintiff's termination, were any written charges, concerns, or reasons for Plaintiff's termination of employment prepared.

A special meeting of the Board was set for July 23, 1970, at which time the Board had decided to take action and carry out the decision to either force Plaintiff to resign or to be terminated. On July 22, 1970, a delegation of three Board members met with another administrator, one Ashley Johnson, and offered him the job of President of Prairie State College. Mr. Johnson accepted at that time, although the appointment was not formally confirmed until July 27.

Plaintiff was informed of the July 23 meeting two days prior to it, when he was informed by his attorney. The public notice for the meeting stated merely that the Board was meeting for the purpose of discussing certain "personnel matters," and made no reference to any intention to consider Plaintiff's termination. Not having received any written charges or reasons for dismissal prior to this meeting, Plaintiff refused to attend. At the meeting, the Board went on record as being unanimously in favor of terminating Plaintiff's employment. Two of the Board members who were not present were contacted by telephone, and in this manner, voted to terminate Plaintiff's employment.

On August 21, 1970, Plaintiff first received a written list of reasons for his termination, this list having been taped to his front door. After receiving this list, Plaintiff made a formal demand for a hearing, through his attorney. The Board, through its attorney, replied that no hearing would be given, as he was not entitled to a hearing of any kind.

Based upon this record, the Court of Appeals for the Seventh Circuit found as follows:

> "Our review of the evidence leaves us with the definite and firm conviction that plaintiff was never offered a fair hearing on termination, and that, in fact, the board prejudged his case before making any hearing available to him. There can be no real dispute that before the special session of the board on July 23, 1970, when plaintiff was to be afforded a hearing, the board had already decided to terminate him, and had in fact made a commitment to another person to hire that person as interim president. The board having prejudged the matter of plaintiff's termination before the July 23 meeting, and being no longer therefore 'a tribunal possessing apparent impartiality,' as required by *Hostrop I*, 471 F.2d at 495, plaintiff did not waive his right to a hearing by absenting himself from that meeting."

ARGUMENT

I.

THE BOARD OF TRUSTEES HAD BECOME INCOMPETENT TO GRANT PLAINTIFF A HEARING TO WHICH HE WAS CONSTITUTIONALLY REQUIRED.

The decision by the Court of Appeals for the Seventh Circuit in this case, holding that Plaintiff had been deprived of that hearing to which he was entitled under the Due Process Clause, was not a departure from the rulings of this Court. Rather, it followed the requirements of due process as set down by this Court on many occasions. Defendants attempt to rely upon this Court's decision in *Withrow* v. *Larkin*, 421 U.S. 35 (1975), in arguing that it is not a violation of due process for one body or administrative agency to both investigate and decide factual issues. Plaintiff does not, and has not challenged this proposition. Nor did the Court of Appeals, either in its first or second decision in this case, deviate from the long-settled principles set down by this Court. In fact, this Court's decision in *Withrow* enforces the decision of the Court of Appeals in this case that Plaintiff was denied his rights to due process.

Boiled down to its bare bones, Defendants' argument is that at some time during a proceeding, any fact-finder, be he judge, jury or administrative agency, will begin to form an opinion as to the final judgment which will be made in the case, and that such a procedure is not constitutionally prohibited. No fault could be found with such a proposition. What defendants ignore, and what was the core of

the holding by the Court of Appeals, is the proposition that here, those who made the decision to discharge Plaintiff, were the very same persons who had instituted the charges, had personal knowledge of the charges, would promulgate the charges against Plaintiff, institute the proceeding against Plaintiff, and implement that decision. In fact, the decision to terminate had been both made and implemented before the "hearing" was to be held, and before Plaintiff had been informed of any of the reasons for the contemplated action. Plaintiff had been told straight out that he had only two choices: 1) resign or 2) be terminated. There was to be no hearing, only action. Indeed, when Plaintiff demanded a hearing after receiving the reasons for his termination, he was informed by the Board that he was entitled to no hearing. It is obvious that the meeting of July 23, 1970, was merely for the purpose of formally ratifying a decision which had been firmly made.

Thus, the decision of the Court of Appeals in finding a violation of Plaintiff's due process rights was no deviation from the consistent rulings of this Court. Indeed, reference need be made no further than this Court's decision in *Withrow* to affirm that view:

> "Concededly, a 'fair trial in a fair tribunal is a basic requirement of due process.' *In re Mirchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). This applies to administrative agencies which adjudicate as well as to courts. *Gibson* v. *Berryhill,* 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed. 2d 488 (1973). Not only is a biased decisionmaker unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' *Murchison, supra.*" 95 S.Ct. at 1464.

As stated in *Withrow,* the vice prohibited in the kind of proceeding faced in *Murchison* was the fact that in there deciding whether the persons before him were guilty of contempt or not "he very likely relied on 'his own personal knowledge and impression of what had occurred in the grand jury room', an impression that 'could not be tested by adequate cross-examination.'" 95 S.Ct. at 1467. So too here, the Board members themselves were the accusers, not based upon any investigation which they had undertaken, but upon the impressions which they had formed in their own minds as a result of their working relationship with Plaintiff. They were not persons who came to the controversy neutral and began to form impressions after making an investigation, but the ones who had caused the investigation to begin, based upon their own personal knowledge and mental processes.

Indeed, Defendants have admitted this fact in their Petition herein, albeit unwittingly, when they state: "The continuing development and presentation of 'evidence' to petitioners resulted not from an *ex parte* investigation, but from first hand observation in the conduct of a close working professional relationship with the Plaintiff."

Whatever else Due Process may mean in varying contexts, it means that the prosecuting witness cannot also be the judge. That is the proposition for which the decision of the Court of Appeals stands, and nothing more. Such a decision presents no new or novel issue to this Court. That decision does not form the basis for a grant of Certiorari by this Court.

II.

THE BOARD OF DISTRICT COLLEGES IS ENTITLED TO NO IMMUNITY.

Defendants next argue that somehow the Board of Colleges, as an entity, is entitled to some kind of immunity from responsibility for having violated Plaintiff's rights. That proposition simply has no merit whatsoever.

This argument is based upon the proposition that to impose liability against the Board is to penalize it for the implementation of its policies. That, however, is not the case at all. The liability imposed here is for the violation of plaintiff's rights to due process—notice and a hearing before depriving him of property rights. Defendants somehow argue that the Board is entitled to immunity because the legislature failed to "provide for a delegation of Board responsibilities at a time when it should recuse itself." (Petition for Certiorari, p. 12) Such a contention has absolutely no foundation whatsoever. It was the Board which placed itself in the situation where it was unable to act properly. It was solely within the province of the Board to prevent itself from being placed in such a position. All it had to do was to grant Plaintiff the procedures to which he was constitutionally entitled. The Board was not somehow thrust into a situation where it had prejudged the issue. The fault was in acting improperly, not in the legislature having failed to foresee a way for the Board to extricate itself from a predicament of its own making.

Indeed, under Illinois law, it is clear that the Board is entitled to no immunity. The Illinois Constitution of 1970 clearly abolishes sovereign immunity.

The Illinois Supreme Court long ago abolished the doctrine of sovereign immunity insofar as it applies to local public entities such as school boards. In *Molitor* v. *Kaneland Unit School District,* 18 Ill. 2d 11, 163 N.E. 2d 89 (1959), the Illinois Supreme Court found that "the whole doctrine of governmental immunity from liability for tort rests upon a rotten foundation." *Id.* at 21. The Court concluded "that the rule of school district tort immunity is unjust, unsupported by any valid reason, and has no rightful place in modern day society." *Id.* at 25.

That is the background upon which the Board's liability must be judged. The argument presented by defendants is that the only way the Board could have complied with constitutional requisites was by not terminating Plaintiff. Such an argument is ingenuous. Although the Board itself must take action regarding Plaintiff's employment, pursuant to Illinois law, there is nothing which would have prohibited them from refraining from making any decision without giving Plaintiff a hearing. Further, there would have been nothing wrong with the Board having hired a hearing officer, or panel of arbitrators, or the like, to hear evidence and make recommendations upon which they might ultimately act.

The Board had several alternatives readily available to it to protect Plaintiff's rights. That they chose not to do so was not a policy decision, or the implementation of any legislative policy. Their actions were simply tortious. They did not offer Plaintiff the hearing to which he was entitled. Their failure to do so was not a discretionary act, nor a matter of policy. There is no issue presented here worthy of discussion.

CONCLUSION

None of the points raised by Petitioners herein are unique or worthy of consideration by this Court. The Petition for Certiorari should be denied.

Respectfully submitted,

WAYNE B. GIAMPIETRO
134 N. LaSalle Street
Chicago, Illinois 60602

JAMES PAPPAS
1492 Aberdeen Street
Chicago Heights, Illinois 60411

Attorneys for Respondent